UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JEFFREY N. GREENE,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 03-36-B-W***
	)	
JO ANNE B. BARNHART,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Disability ("SSD") appeal raises the threshold question whether the commissioner's action on the plaintiff's 2001 application (denying it on *res judicata* grounds and, alternatively, on the merits) is judicially reviewable and, to the extent the merits are reached, whether the denial at Step 2 was supported by substantial evidence. I recommend that the decision of the commissioner, which I determine is judicially reviewable, be vacated and the case remanded for further development.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. § 404.1520,

[1] This action is properly brought under 42 U.S.C. § 405(g). The commissioner has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on December 11, 2003, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

Goodermote v. Secretary of Health & Human Servs., 690 F.2d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the plaintiff had acquired sufficient quarters of coverage to remain insured only through March 31, 1983, Finding 2, Record at 22; that the issue of his disability status through March 31, 1983 was *res judicata*, Finding 3, *id*.; that between April 8, 1978 and March 31, 1983 he had suffered, at least intermittently, from situational anxiety and depression, an acute episode of lumbosacral strain and sciatica and multilevel degenerative disc disease at the lumbar and lumbosacral levels of the spine, Finding 4, *id*.; between April 8, 1978 and March 31, 1983 he did not suffer from any severe impairment or combination of impairments meeting the applicable durational criteria, Finding 5, *id*.; and he, therefore, was not under a disability at any time prior to March 31, 1983, Finding 6, *id*. The Appeals Council declined to review the decision, *id*. at 3-4, making it the final determination of the commissioner, 20 C.F.R. § 404.981; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. § 405(g); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

For purposes of his alternative holding on the merits, the administrative law judge reached Step 2 of the sequential evaluation process. Although a claimant bears the burden of proof at this step, it is a *de minimis* burden, designed to do no more than screen out groundless claims. *McDonald v. Secretary of Health & Human Servs.*, 795 F.2d 1118, 1123 (1st Cir. 1986). When a claimant produces evidence of

an impairment, the commissioner may make a determination of non-disability at Step 2 only when the medical evidence "establishes only a slight abnormality or combination of slight abnormalities which would have no more than a minimal effect on an individual's ability to work even if the individual's age, education, or work experience were specifically considered." *Id.* at 1124 (quoting Social Security Ruling 85-28).

The plaintiff attacks the application of *res judicata* on several fronts, among them violation of procedural due process. *See* Plaintiff's Itemezed [sic] Statement of Specific Errors ("Statement of Errors") (Docket No. 6) at 7-19. He asserts that once the *res judicata* bar is overcome, the Step 2 determination readily can be seen to have been unsupported by substantial evidence. *See id*. at 19-27. I agree.

I. Discussion

A. Subject Matter Jurisdiction

In the body of his decision, the administrative law judge characterized the plaintiff as having sought "reopening and revision" of a prior SSD application filed on June 7, 1993. Record at 11. He held the instant claim barred by *res judicata*, then alternatively denied it on the merits at Step 2. *See id*. at 12-22.

Denial of a request to reopen a claim for benefits, regardless whether couched in terms of application of the doctrine of *res judicata*, generally is not subject to judicial review absent a colorable constitutional claim. *Torres v. Secretary of Health & Human Servs.*, 845 F.2d 1136, 1138 (1st Cir. 1988). On November 24, 2003 I held a teleconference with counsel to address this threshold issue. *See* Docket No. 10. Counsel for the plaintiff represented that he had no knowledge of the asserted 1993 application and on that basis could not agree with the commissioner that the two claims (the asserted 1993 claim and the instant claim) were the same. *See id*. Counsel for the commissioner agreed to advise the court no later than December 1, 2003 whether the commissioner still possessed the 1993 case file. *See id*.

He also agreed that the commissioner's own Program Operations Manual System ("POMS") directs that in circumstances in which a previous claim file cannot be located, the commissioner will not assert *res judicata* as an affirmative defense. *See id; see also* POMS DI 27516.005, 2001 WL 1933734 (SSA-POMS).[2]

By e-mail dated December 1, 2003, counsel for the commissioner advised the court that the commissioner had been unable to locate the 1993 case file and accordingly would not be advancing a *res judicata* defense. Counsel noted, however, that he intended to defend the case on the basis of the alternative Step 2 holding. At oral argument, counsel for the commissioner confirmed the substance of this e-mail.

Even though the commissioner has withdrawn her *res judicata* defense, I consider *sua sponte* whether the court possesses subject-matter jurisdiction to review the alternative Step 2 holding. *See White v. Gittens*, 121 F.3d 803, 806 (1st Cir. 1997) ("It is too elementary to warrant citation of authority that a court has an obligation to inquire sua sponte into its subject matter jurisdiction, and to proceed no further if such jurisdiction is wanting.") (citation and internal quotation marks omitted). I readily conclude that it does.

As a matter of constitutional due process, a Social Security claimant is entitled to judicial review of a decision on a successive claim to the extent it fairly can be said to be a "new" claim. *See, e.g., Matos v. Secretary of Health, Educ. & Welfare*, 581 F.2d 282, 286 n.6 (1st Cir. 1978) ("If a claimant were to raise a new and different claim, and the Secretary were to refuse to act based on Res judicata, the claimant would be denied all opportunity for a hearing unless judicial review were available. Such a result would contravene the provisions of the Act, whereby affected parties must be given 'reasonable notice and

[2] During the November 24 teleconference, counsel for the commissioner identified record evidence of the existence of a 1993 claim in the form of a string of agency codes beginning: "Greene, Jeffrey N Psy:T51 DS:NO4-06/07/93 TMR:DX ID:DI TDA: 07/20/93 SEQ: 1" Record at 94. However, this evidence is unenlightening as to the substance of the prior claim. (*continued on next page*)

opportunity for a hearing', 42 U.S.C. § 405(b), and of due process."). The plaintiff challenges the application of *res judicata* to his claim. *See* Statement of Errors at 7-19. However, in the absence of the 1993 case file (or any other evidence of the substance of the prior claim), he is denied the opportunity for meaningful judicial review of that plaint – raising fundamental due-process concerns. That, in turn, renders the commissioner's alternative Step 2 holding judicially reviewable. *See, e.g., Matos*, 581 F.2d at 286 n.6 ("When constitutional questions are in issue, the availability of judicial review is presumed.") (citations and internal punctuation omitted).

B. Merits of Alternative Step 2 Holding

With this threshold issue resolved, I turn to the merits of the administrative law judge's alternative holding. As the plaintiff suggests, *see* Statement of Errors at 19-20, the Record contains no analysis of the impact of the plaintiff's physical and mental impairments on his functioning prior to his date last insured. I find no report from a Disability Determination Services ("DDS") consultant, and no medical advisor was called to testify at hearing.

Although an administrative law judge is not precluded from "rendering common-sense judgments about functional capacity based on medical findings," he "is not qualified to assess residual functional capacity based on a bare medical record." *Gordils v. Secretary of Health & Human Servs.*, 921 F.2d 327, 329 (1st Cir. 1990); *see also, e.g., Stanwood v. Bowen*, 643 F. Supp. 990, 991 (D. Me. 1986) ("Medical factors alone may be used only to screen out applicants whose impairments are so minimal that, as a matter of common sense, they are clearly not disabled from gainful employment. . . . [A]n impairment is to be found not severe only if it has such a minimal effect on the individual's ability to do basic work

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See id.

activities that it would not be expected to interfere with his ability to do most work.") (citations and internal quotation marks omitted).

The Record in this case cannot sustain a "common-sense" finding by a layperson that the plaintiff's impairments collectively were non-severe as of his date last insured. The plaintiff suffered a work-related back injury in April 1978 when attempting to lift a roll of cloth weighing about fifty pounds. *See* Record at 30-31, 110. While he subsequently had good days and bad days, *see, e.g.*, *id*. at 117-23, he did not work thereafter, *see id*. at 30, and was noted by various examining or treating physicians to have resultant work limitations, *see, e.g.*, *id*. at 111 (report dated August 31, 1978 by T.C. Dela Cruz, M.D., recommending that plaintiff continue to wear a brace and abstain from any heavy lifting), 114 (pre-vocational assessment dated October 27, 1980 by Philip L. Mossman, M.D., noting that plaintiff "obviously" had "chronic low back condition" and, although Dr. Mossman was sure there was work plaintiff could do, "he also has a significant potential of reinjuring himself if he doesn't do it properly"), 122 (assessment dated June 2, 1978 by L.K. Henderson, M.D., that plaintiff was "fully disabled from doing heavy work"), 135 (injured worker treatment report dated January 7, 1987 by William L. Newkirk, M.D., stating that the plaintiff "would be limited in any work that required heavy lifting, repetitive twisting and bending, prolonged sitting and prolonged standing.").

To complicate matters, the anxiety and depression the plaintiff contemporaneously was noted to have been suffering prior to his date last insured arguably was related to a then-undiagnosed Vietnam War-related Post-Traumatic Stress Disorder ("PTSD"). *See, e.g.*, *id*. at 116 (psychological evaluation dated October 30, 1980 by Frank Luongo, Ph.D., noting "tremendous amount of strain, depression, agitation, rumination and bitterness regarding the consequences of [the plaintiff's] accident and the subsequent

difficulties in which he has become involved in trying to maintain his employment benefits at the same time as finding suitable employment for himself"), 107 (Department of Veteran's Affairs client intake assessment dated October 19, 2001, by Joseph A. DeGrasse, BS, team leader, diagnosing plaintiff, who was exposed to losses and extreme danger in combat situations in Vietnam in the 1960s, with chronic, severe PTSD).[3]

In short, the administrative law judge committed reversible error in determining (in the face of significant evidence to the contrary, and without benefit of the assistance of appropriate experts) that the plaintiff's impairments as of his date last insured collectively constituted only "slight abnormalities which would have no more than a minimal effect on [his] ability to work even if [his] age, education, or work experience were specifically considered." *McDonald*, 795 F.2d at 1124 (citation and internal quotation marks omitted).[4] While this error alone warrants remand, for the benefit of the parties on remand I

[3] Others besides Dr. Luongo contemporaneously noted the plaintiff's anxiety or odd behavior prior to his date last insured. *See, e.g.*, Record at 153 (report dated February 19, 1981 by vocational consultants noting: "Jeff was extremely tense and nervous. When he answered the door he went on by and climbed a ladder up a large oak tree. From an upper limb he said he was feeding the birds. This behavior is a mite peculiar even in the dead of Maine Winter."). While, as the administrative law judge noted, Dr. Luongo did not attribute the plaintiff's anxiety to PTSD or the Vietnam War, *see* Record at 21, that does not necessarily mean that an expert reviewing the totality of the evidence would not find a connection between the earlier observed anxiety and depression and the later-diagnosed PTSD.

[4] At oral argument, counsel for the commissioner argued that the rule against layperson interpretation of raw medical evidence is not implicated at Step 2, pointing out that the First Circuit has applied it only at Step 4 (which entails assessment of a claimant's residual functional capacity). My research corroborates that the First Circuit has not applied this rule at Step 2. However, I am unpersuaded that the First Circuit would decline to do so were the issue squarely presented. Step 2 analysis, like Step 4 analysis, requires consideration of the impact of impairments on ability to function at work. As this court suggested in *Bowen*, the record may be such as to permit an administrative law judge to make a common-sense judgment (without aid of medical consultants) that a claimant's impairments have no more than a minimal impact on capacity to work and thus are non-severe for purposes of Step 2. *See Bowen*, 643 F. Supp. at 991. However, there are cases (such as this one) in which the evidence of functional limitation is too significant, or the record otherwise raises too many questions, to permit such a lay judgment. In those cases, the administrative law judge walks out on a limb in choosing to make a finding of non-severity without the aid of a medical consultant. *See, e.g., Duncan v. Shalala*, No. 92-7134, 1993 WL 318854, at **2 (10th Cir. Aug. 19, 1993) (noting, in reversing district court's affirmance of denial of benefits at Step 2, "[w]e are at a loss . . . to understand how the ALJ could have properly considered this [medical] evidence without some sort of follow up contact with claimant's treating physician for help in deciphering the various notes and test results."); *Pilcher ex rel. Pilcher v. Massanari*, 139 F. Supp.2d 966, 970 (N.D. Ill. 2001) ("Claimant contends the ALJ should have consulted a medical expert to review the medical history to determine whether Pilcher's cardiac, shoulder, and mental impairment may have been severe prior to the date he first sought treatment. The Court agrees. . . . The ALJ, when considering the severity of the Claimant's impairments, is not free to reach his own medical conclusions or to 'practice medicine.'") (citation omitted).

comment briefly on two of the plaintiff's remaining points of error:

1. **Misapprehension of durational requirement**: The plaintiff correctly asserts that the administrative law judge misperceived the nature of the twelve-month durational requirement as applied to impairments that wax and wane in intensity. *See* Statement of Errors at 21-22; *see also* Record at 21 (observation by administrative law judge that plaintiff's "vertobrogenic disorder was significantly symptomatic on only an intermittent basis, but not for any continuous period of twelve months or more."). A condition need not be "severe" or symptomatic day in and day out for twelve straight months to meet the durational requirement. Rather, as the Supreme Court recently observed in *Barnhart v. Walton*, 122 S.Ct. 1265, 1270 (2002), a claimant must show both that his or her impairment has lasted (or is expected to last) for twelve months and, ultimately (for purposes of being found disabled and hence entitled to benefits), that it is severe enough to prevent him or her from engaging in substantial gainful activity for at least twelve months. For purposes of Step 2, the plaintiff met the durational requirement: He had impairments that had lasted or were expected to last for at least twelve months.

2. **Failure To Apply Social Security Ruling 83-20**. The plaintiff also asserts, among other things, that the administrative law judge erred in failing to determine the onset date of his disability pursuant to Social Security Ruling 83-20 ("SSR 83-20"). *See* Statement of Errors at 22-26. SSR 83-20 concerns determination of the onset date of disability. *See* SSR 83-20, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991, at 49 ("In addition to determining that an individual is disabled, the decisionmaker must also establish the onset date of disability."). Such a determination need not be made unless an individual has been determined at some point to have been disabled. *See, e.g., Key v. Callahan*, 109 F.3d 270, 274 (6th Cir.1997) ("Since there was no finding that the claimant is disabled as a result of

his mental impairment or any other impairments or combination thereof, no inquiry into onset date is required."). The administrative law judge did find the plaintiff to be "significantly functionally restricted by the impairments from which he *currently* suffers," recognizing that he "was subjected to experiences in the Viet Nam war [sic] that are now profoundly affecting his life[.]" Record at 14, 17 (emphasis in original). However, it is not clear that the administrative law judge meant to imply that the plaintiff was disabled as of the date of decision. Nor is there any other evidence that such a finding ever was made. Accordingly, I am not persuaded that SSR 83-20 should have been applied in this case.

II. Conclusion

For the foregoing reasons, I recommend that the commissioner's decision be **VACATED** and the case **REMANDED** for proceedings consistent herewith.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 15th day of December, 2003.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

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